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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,
STATE OF IOWA,
Intervenor.

BRIEF FOR STATE OF IOWA, INTERVENOR.

JOHN M. RANKIN, Attorney General of Iowa,
State House,
Des Moines, Iowa,
NEILL GARRETT, Special Assistant Attorney General of Iowa,
1204 Equitable Building,
Des Moines, Iowa,
Attorneys for State of Iowa, Intervenor.

Of Counsel:
HORACE L. LOHNES and
C. WALTER HARRIS,
1111 Munsey Building,
Washington, D. C.

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Respondent.

STATE OF IOWA,
Intervenor.

BRIEF FOR STATE OF IOWA, INTERVENOR.

This matter is before the Supreme Court of the United States upon a Writ of Certiorari to the United States Court of Appeals for the District of Columbia on the opinion and decision by that Court reported in 151 F. (2d) 20 in the above entitled action. The Court of Appeals affirmed the order of the Federal Power Commission which denied the application for a permit by the petitioner herein to construct a project in the Cedar River located in the State of Iowa.

JURISDICTION.

The petitioner invokes the jurisdiction of this Court under the provisions of Section 240(a) of the Judicial Code

as amended by the Act of February 13, 1925 (28 U.S.C.A. Sec. 347) and Section 313(b) of the Federal Power Act (39 Stat. 860, 16 U.S.C.A. Sec. 825(b)).

FEDERAL STATUTES INVOLVED.

The principal statute involved is Section 9(b) of the Federal Power Act. The Federal Power Act is the Act of June 10, 1920 (C. 285, 41 Stat. 1063 as amended, August 26, 1935; C. 687, 49 Stat. 838, 16 U.S.C. Sec. 791(a).

QUESTIONS INVOLVED.

The petitioner has set out on pages 2 to 5 of its brief twelve questions which petitioner states it is presenting to this Court. The State of Iowa, the intervenor herein, submits that the questions before this Court are as follows:

1. Whether compliance with Section 9(b) of the Federal Power Act (16 U.S.C.A. Sec. 802(b)) is required as a prerequisite to the granting of a license by the Federal Power Commission;

2. Whether there are applicable laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power"; and in any other business necessary to effect the purposes of a license under the Federal Power Act;

3. Whether the United States Court of Appeals erred in finding that there are applicable laws of the State of Iowa, the compliance with the requirements of which is a prerequisite under the provisions of Section 9(b) of the Federal Power Act to the granting of a license to the petitioner;

4. Whether Congress has preempted the entire field by the enactment of the Federal Power Act to the exclusion of the provisions of the laws of the State of Iowa as contained in Chapter 363 of the Code of Iowa.

STATEMENT.

The petitioner herein is a private corporation organized under the provisions of Chapter 390.1 of the Code of Iowa, 1939. The petitioner challenges the opinion and judgment of the United States Court of Appeals for the District of Columbia in which that Court affirmed the order of the Federal Power Commission which denied the application of the petitioner for a permit to build a dam and hydro-electric power project on the Cedar River within the State of Iowa.

The State of Iowa in its sovereign capacity, intervened in the proceedings before the Federal Power Commission and in the United States Court of Appeals for the District of Columbia, and is now opposing and resisting the petition in these certiorari proceedings for the reason that petitioner failed to comply with the provisions of Section 9(b) of the Federal Power Act.

The petitioner applied to the Federal Power Commission for a permit to build and construct a hydro-electric project and dam in the Cedar River located wholly within the State of Iowa in such a manner as to completely divert the River from its riverbed through a canal, which canal would empty into the Mississippi River and in which canal the power unit would be constructed. By this diversion of the water in the Cedar River, twenty-nine miles of the river from the point of the proposed dam to its juncture with the Iowa River would become a dry run.

The Cedar River flows into and joins the Iowa River about 29 miles below the site of the proposed project, and the Iowa River flows into and joins the Mississippi River.

The petitioner's only purpose is to construct a power project to sell electric current commercially. It is admitted, and the nature of the proposed project discloses, that there could be no navigation whatsoever of even the smallest craft through, around or over this dam, or through the diversion canal. The result would be an absolute destruction of navigation or commerce from above the dam to the Mississippi River or from the Mississippi River into the Cedar River at any point. The undisputed evidence shows without dispute that the Cedar River has been utilized by the cities and towns located along its course as a means of carrying the sewerage from these various cities and towns, and that the dam and the diversion canal will greatly interfere therewith and will undoubtedly create a health hazard and nuisance. The cities of Cedar Rapids, Waterloo and Vinton, and many towns are located upon the Cedar River above the proposed project and their sewerage systems empty into the Cedar River and the sewage is carried away by the river and into the Iowa River and into the Mississippi River. The project would destroy the recreational and fishing facilities afforded to the public in the Cedar River as now constituted.

Further, it is affirmatively shown in the record and it is not denied by petitioners, that the proposed project will overflow and inundate portions of paved primary highways of the State of Iowa, namely, United States Highways Nos. 6, 38 and 61 and Iowa Primary Highway No. 22 to such an extent that it will be necessary to reroute said highways and to construct new grades and paving, all at great cost, expense and inconvenience to the State of Iowa and to the public. The foregoing statement is sufficient to inform the Court as to the public interest of the State of Iowa in the proposed project.

The sovereign State of Iowa, through its Executive Council, which is composed of the Governor, Secretary of State, Auditor of State, Treasurer of State and Secretary of

Agriculture, and its Attorney General, because of the public interest of the State in the results of the proposed project if constructed, resisted the application of the petitioner for a permit before the Federal Power Commission and resisted the appeal in the United States Court of Appeals for the District of Columbia, and is now resisting and objecting to the petitioner's petition in these proceedings, for all of the reasons hereinafter stated.

Section 9(b) of the Federal Power Act (16 U.S.C.A. 802(b)) is the statute which is primarily involved in these proceedings. It provides among other things as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter." Act of June 10, 1920, c.285 Sec. 9, (41 Stat. 1068); U.S.C. Title 16, Sec. 802.

The State of Iowa has laws "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power" in the navigable and non-navigable rivers located within the State. Those provisions of law are in Chapter 363 of the Code of Iowa, 1939, and will be specifically referred to in the argument.

The petitioner ignored the provisions of said Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals, that the petitioner had not complied with the requirements of any of the laws of the

State of Iowa "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and regulation of water power in its streams and to the building of obstructions in the rivers located within the State, said provisions of the Iowa law are inapplicable and invalid in that the Federal Government by the enactment of the Federal Power Act, has completely and fully taken over the entire field. This in substance is the position of the petitioner as to the law.

SUMMARY OF ARGUMENT.

I.

Section 9(b) of the Federal Power Act requires as a prerequisite to the granting of a license by the Federal Power Commission under the provisions of the Federal Power Act, that an applicant must submit satisfactory evidence of compliance with the applicable laws of the State in which the project is located with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power. The State of Iowa has applicable laws contained in Chapter 363 of the Code of Iowa, 1939, which requires that before any dam or project can be built in any of the navigable or meandered streams located in the State of Iowa, a permit must be secured from the Executive Council of Iowa after presentation of evidence, and a hearing is had.

Petitioner contends that the laws of the State of Iowa are inapplicable to its project because petitioner asserts that

the Federal Power Act took over and preempted the whole field and that it is not required to secure a permit from the Executive Council of the State of Iowa, and that if so the Iowa statutes are invalid and unconstitutional.

The proposed project will not only cut off approximately twenty-nine miles of the Cedar River and divert the water through a diversion canal to the Mississippi River but the water impounded above the dam will flood paved primary United States and State highways such as to require re-routing and new construction. The Cedar River is used to carry away sewerage from many cities and towns located along its course and above the site of the proposed project, including the City of Waterloo, having a population of 51,000, Cedar Rapids with a population of 62,000, and Vinton with a population of 4,000, all of which use the River for the purpose of disposing of their sewerage.

The State Executive Council under the provisions of Chapter 363 is required to protect the public, the interests of the State, and the rights of users of the River and when permits are granted to make such reasonable requirements and regulations as will effect those results.

The United States Court of Appeals for the District of Columbia affirmed the order of the Federal Power Commission denying the application of petitioner because it had not presented satisfactory evidence of compliance with the applicable laws of Iowa as required by Section 9(b) of the Federal Power Act. The United States Court of Appeals did not abuse its discretion in arriving at this decision. The Federal Power Act does not supersede State laws such as are involved in Chapter 363 of the Code. On the contrary the Power Act very carefully by specific provisions preserves and saves State statutes, and the Act indicates clearly an intention of Congress to cooperate with the States in the authorization of structures and obstructions in navigable streams. The

Act definitely contemplates a dual system of control by both the State and the Federal Government. The legislative history of the Act amply sustains this intention on the part of Congress in the enactment of the Act.

II.

Furthermore, the petitioner is not entitled to judicial review in the Courts of the order of the Power Commission denying its application for a license. The petitioner ignored the Iowa statutes as contained in Chapter 363 of the Code of Iowa, 1939, and made no attempt to comply with those provisions of State law. Petitioner merely claims that the State laws are invalid and that therefore it is not required to recognize them or to comply with them, notwithstanding the plain language of Section 9(b) of the Federal Power Act. General allegations that there is a conflict between the State law and the Federal law raise an issue too vague and ill-defined to admit of judicial determination. The issues in this case show no invasion of the sovereign rights of the United States, and such rights are not shown to be threatened. The control of navigation by the United States may be threatened by the imminent construction of the dam but not by permission to construct it. To pre-determine even the limited field of water power rights of different sovereigns pregnant with future controversies, is beyond the judicial function. The Courts deal with concrete legal issues presented in actual cases, not abstractions. The United States Court of Appeals did not abuse its discretion in refusing to pass upon the validity of the statutes of the State of Iowa.

III.

The petitioner's argument does not sustain its contentions. Section 23(b) of the Federal Power Act was an amendment enacted long after the enactment of the Federal Power Act for the purpose of clarifying the application of

the Act in border line cases and in cases where commerce and navigation were affected by obstructions in non-navigable streams. The section does not state the basic principles and requirements for the obtaining of a license by an applicant therefor.

The cases cited by petitioner do not sustain its position in that they all involve situations where a State permit or license had already been obtained, and the only question was whether or not the proponents of the project were subject also to the Federal Power Act. There is no issue joined in any of these cases cited by petitioner showing a conflict between the State and the Federal Government. Therefore, they are not applicable to the issues in the case at bar.

The presentation by petitioner that the history of the Bill through Congress shows an intention on the part of Congress to preempt the entire field is not borne out by the record. The citations from the Congressional Record and from the Committee record in Congress sustain the decision and opinion of the lower Court and the contention of the State of Iowa.

The petitioner takes the position that it is standing in the place of the Federal Government as though the Federal Government were seeking to construct the project. The Federal Power Act does not invest an applicant with the powers of the Federal Government. The Federal Power Act is restrictive in nature and a license under it is restrictive.

The United States Court of Appeals did not err in affirming the judgment of the lower Court and its opinion and decision should be affirmed by this Court.

ARGUMENT.

The opinion of the United States Court of Appeals in this case is set out in full in the Transcript of the Record commencing with page 43. It is reported in 151 F. (2d) 20. That opinion is a very thorough statement of the applicable principles of law and they are sustained by ample citations of authority. The State of Iowa submits that that opinion alone is a sufficient brief and argument to sustain the propositions asserted by the State of Iowa to require and to warrant its affirmance by this Court.

I.

A. SECTION 9(b) OF THE FEDERAL POWER ACT REQUIRES SUBMISSION TO THE COMMISSION OF SATISFACTORY EVIDENCE THAT APPLICANT HAS COMPLIED WITH THE APPLICABLE STATE LAWS AS A PREREQUISITE TO THE GRANTING OF A LICENSE BY THE COMMISSION.

Section 4(e) of the Federal Power Act (16 U.S.C.A. 797(e)) authorizes and empowers the Federal Power Commission among other things, to issue licenses to citizens of the United States, or to any association of such citizens of the United States, or to any corporation organized under the laws of the United States or of any State thereof, or to any State or municipality "for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works, necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from and in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce". There are several restrictive provisos stated in the Section.

Section 4(f) (16 U.S.C. 797(f)) provides that the Commission shall have the power to issue preliminary permits for

the purpose of enabling applicants for a license "to secure the data and to perform the acts required by Section 9 (802) of this Title; Provided, however, that upon the filing of any application for a preliminary permit by any person, association or corporation, the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application".

Section 9(b) (16 U.S.C.A. 802) of the Federal Water Power Act is the Section which is primarily involved in this proceeding. It provides as follows:

> "Each applicant for a license under this Chapter shall submit to the Commission—
>
> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power, and in any other business necessary to effect the purposes of a license under this Chapter."

The petitioner ignored the provisions of Section 9(b) and admitted both before the Power Commission and the United States Court of Appeals that it had not complied with the requirements of the laws of the State of Iowa "with respect to bed and banks and to the appropriation, diversion and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting and distributing power". The petitioner takes the position that although the State of Iowa has provisions of law applicable to the development and regulation of water power in its streams as contained in Chapter 363 of the Code of Iowa, 1939, said provisions of the Iowa law are invalid in that the Federal Government by the enactment of the Fed-

eral Power Act has completely and fully taken over the entire field. As stated in the opinion by the Court of Appeals, petitioner argues that (1) no applicable Iowa law requires one in its position to secure a permit and (2) if the Iowa law is intended to be applicable it is unconstitutional and compliance cannot be required.

The State of Iowa submits that the language of Section 9(b) of the Act is plain and unequivocal. Obviously Congress by this language created a condition precedent to the granting of a license by the Commission which is mandatory and which in effect is jurisdictional. *United States* v. *West Virginia*, 293 U.S. 463 at 472, 79 L. Ed. 1546, 1552. This Court speaking through Mr. Justice Stone in that case referred to the fact that Section 9(b) of the law makes the obtaining of a State license a prerequisite to the obtaining of a Federal license. It is therefore plain that Congress by this language expressly required as a prerequisite to the granting of a license by the Commission, compliance with the laws of the State where the project is to be located "with respect to bed and banks, and to the appropriation, diversion, and use of water for power purposes, and with respect to the right to engage in the business of developing, transmitting and distributing power".

B. LAWS OF THE STATE OF IOWA.

The applicable provisions of the Iowa law are contained in Chapter 363 of the Code of Iowa and are set out commencing with page 9 of the Appendix to the Brief for the Petitioner. It is therefore not necessary to re-copy those provisions of the Iowa law into our brief.

It will be observed that Section 7767 of the Iowa law provides as follows:

> "Prohibition—permit. No dam shall be constructed, maintained, or operated in this state in any navigable or

meandered stream for any purpose, or in any other stream for manufacturing or power purposes, nor shall any water be taken from such streams for industrial purposes, unless a permit has been granted by the executive council to the person, firm, corporation or municipality constructing, maintaining, or operating the same. (R60, Sec. 1264; C73, Sec. 1188; C97, Sec. 1921; C24, 27, 31, 35, Sec. 7767.)

Section 7768 provides that an applicant shall make application for a permit to the Executive Council of the State of Iowa which is composed of the Governor, the Secretary of State, the Auditor of State, the Treasurer of State, and the Secretary of Agriculture. It is required that this application shall contain certain information such as the name of the navigable or meandered or other stream involved, a description of the site for the dam and the names of the riparian owners affected; the purpose for which the dam is to be constructed including the use to which the water is to be put, a general description of the dam, raceways, canals and other constructions including the specifications as to the material and plan of construction, and a general description of all booms, piers and other protection works proposed to be erected; the approximate amount of hydraulic power that the dam is capable of developing, and the amount of power to be used; a map or blueprint showing the lands that may be affected and the ownership of each tract of land within the affected area, and such other additional information as the Executive Council may require.

Section 7769 provides the notice and the method of giving notice of the hearing and Section 7770 provides for the hearing and the taking of evidence.

Section 7771 provides as follows:

"When Permit Granted. If it shall appear to the council that the construction, operation, or maintenance of the dam will not materially obstruct existing navi-

> gation, or materially affect other public rights, will not endanger life or public health, and any water taken from the stream in connection with the project is returned thereto at the nearest practicable place without being materially diminished in quantity or polluted or rendered deleterious to fish life, it shall grant the permit, upon such terms and conditions as it may prescribe. (R60, Sec. 1269; C73, Secs. 1193, 1198; C97, Sec. 1930; C24, 27, 31, 35, Sec. 7771)."

It will be further noted that in cases where the water is to be used for manufacturing purposes the Executive Council shall not grant a permit until the applicant has presented a Certificate of the State Department of Health showing its approval of the use of the water for the purposes specified.

Section 7776 enjoins the duty upon the Executive Council to investigate the whole project so as to determine the best methods to conserve and protect as far as possible all public and riparian rights in the waters of the State and "to protect the life, health, and property of the general public". There are also provisions for the exercise of eminent domain and the condemnation of property necessary for the project.

Further, Section 7796 of the Code of Iowa provides as follows:

> "State Lands. Whenever the erection of any such dam will affect highways or state-owned lands, the applicant shall as a condition precedent secure a permit from the board, commission, or other official body charged with jurisdiction over and control of said highways or state-owned lands. (C24, 27, 31, 35, Sec. 7796)."

It will be observed that there are laws of the State of Iowa such as are referred to and described in Section 9(b) of the Federal Power Act. These laws enjoin upon the Executive Council the duty to protect the general public and the citizens of the State with respect to bed and banks and

to the appropriation, diversion and use of water for power purposes and for any other purpose. The Iowa statutes require not only concern and supervision over the general welfare of the citizens of the State but the protection of the public and private property and health and recreational matters. These matters are all a part of the police power of the State.

There can be no question but that these provisions of the Iowa law are of the character and kind, compliance with which are required by the plain language of Section 9(b) of the Federal Power Act.

As heretofore stated, the proposed project will inundate and destroy portions of paved primary United States and State Highways such as to require rerouting and new construction at great cost. The Cedar River is used by many cities and towns along its course for the carrying away of sewerage from those cities and towns. The City of Waterloo, having a population in excess of 51,000, Cedar Rapids, having a population in excess of 62,000, and Vinton, having a population in excess of 4,000, all use the Cedar River for their sewerage disposal. Obviously the damming up of this river and creating a large lake above the dam as proposed herein, and the only outlet thereof being a canal to the Mississippi River, undoubtedly would cause a health hazard because of this sewerage in the river which would thus be impounded. It is admitted by petitioner that it did not comply with Section 7796 of the Iowa law providing that where highways and State owned lands are affected, an applicant shall as a condition precedent secure a permit from the State Highway Commission which has charge of the primary highways of the State, and from the State Conservation Board which has supervision over the recreational, game and fishing facilities of the State. Compliance with Section 7796 is a prerequisite to obtaining a license from the Executive Council under the provisions of Chapter 363 of the Code of Iowa, and

petitioner admits that it has not even attempted to comply with any of those provisions of the Iowa law.

As stated in the opinion by the United States Court of Appeals herein (T. 46) "In enacting the Federal Power Act, it was not the intention of Congress that the Federal Government should occupy the field completely, or that the States should be excluded. On the contrary, the Act contemplates a dual system of control and the exercise of appropriate powers by the State, as well as by the Federal Government. This is the plain purpose of Section 9(b). It is revealed also, by other sections of the Act." This pronouncement by the Court of Appeals is sustained by the language of this Court in *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, 428 and 429, 85 L. Ed. 243, 264.

The Federal Power Commission in its opinion filed in connection with its order dismissing petitioner's application, stated the following:

> "We have given careful consideration to the conflicting contentions of the applicant and the State of Iowa with respect to the applicability and effect of the Iowa statutes in this proceeding. But, as previously indicated, we are bound by the requirements of Section 9(b) of the Federal Power Act, which provides for submission to the Commission of satisfactory evidence that the applicant has complied with the State laws."

The Federal Power Commission has always taken the position that Section 9(b) of the Act requires a showing by satisfactory evidence that State laws such as are referred to in the Section, must be complied with as a prerequisite to the granting of a license by the Commission. Such an interpretation by the administrative body which presumably would be alert to exercising as much power as the law gives, it is significant in determining whether such power was actually conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 85 L. Ed. 881.

As stated by the Court of Appeals, "The fact that particular phases of an interstate activity have long been regulated by States, has been recognized as a strong reason why, in the continued absence of conflicting Congressional action, the State regulatory laws should be declared valid". *U. S.* v. *Southeastern Underwriters Association*, 322 U.S. 533, 548-549, N. 32.

Also as stated by the lower Court where the Federal law authorizes State action, such action is permissible even as to matters which could otherwise be regulated only by uniform national enactment. *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 155.

It is fundamental that the State may legislate concerning local matters which Congress could have covered but did not. *Hines* v. *Davidowitz*, 312 U.S. 52, 68. As stated, other provisions in the Federal Water Power Act indicate clearly that Congress did not intend to preempt and take over the entire field but intended to recognize certain rights of the State in the waters and rivers of the State.

The case at bar is different from the other cases in the books which have come to our attention in this respect. The petitioner here is attempting to force a license from the Federal Power Commission to build its project without reckoning with the applicable laws of the State of Iowa. Every other case involves basically a controversy with the Federal Power Commission as to whether the Federal Power Act applies and a license is required under it where the applicant has already procured and is acting under a license issued by the State under and by virtue of the State laws. The question in each of these cases is not whether the State law has been superseded but whether or not the claimant is subject also to the provisions of the Federal Power Act and must secure a license from the Federal Power Commission in addition to the rights obtained from the State.

The State of Iowa in this case is not contending that the petitioner herein must secure its license from the State instead of from the Federal Power Commission, nor does it contend that the Federal Power Commission in cases where the Federal Government has jurisdiction under the commerce clause of the constitution does not have jurisdiction. The State of Iowa contends merely that the Federal Power Act recognizes certain rights of the State of Iowa and that the Federal Power Act requires compliance with those designated laws of the State before the Federal Power Commission can take jurisdiction or can grant a license under its law. There is no conflict claimed by the State of Iowa in this case. It is possible and conceivable that if an application were made by the petitioner herein to the Executive Council for a permit under the State laws and a hearing is held, that a satisfactory plan might be worked out by which the State could issue a permit to the applicant. On the other hand, it is conceivable that the plan as described in the evidence before the Federal Power Commission might have to be altered to meet certain requirements of the State under its police power. It is also conceivable that a plan might be presented to the Executive Council of the State of Iowa which would be so injurious and contrary to the public interest as to require that the application be denied. There may be no conflict between the affirmative requirements and restrictions placed by the State upon the project with those placed upon it by the Federal Power Commission. Also, if the requirements of the State are no more strict than those of the Power Commission as to the proposed project, then there could be no controversy. The only opportunity for conflict would be where the State made an affirmative requirement and the Federal Power Commission made a contrary affirmative requirement in the operation and construction of the project. That question has not arisen in this case. It would have to be decided according to the existing situation when it does arise.

C. OTHER PROVISIONS OF THE FEDERAL POWER ACT CLEARLY DISCLOSE THE INTENTION OF CONGRESS NOT TO PREEMPT THE WHOLE FIELD.

There are many provisions in the Federal Power Act which indicate clearly that it was not the intention of Congress that the Federal Government should occupy the whole field completely and that the State should be excluded. The Act definitely contemplates a dual system of control by both the State and the Federal Government. See Sections 4(c), 4(f), 7(a), 10(e), 14, 19, 20 and 27; (16 U.S.C. Secs. 797(c), 797(f), 800(a), 803(e), 807, 812, 813 and 821.)

An examination of Section 27 (821) indicates clearly that Congress did not intend "in any way to interfere with the laws of the respective states relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." This language is broad and general. It effectively saves all State laws upon the subjects referred to. There can be no question but that the laws of the State of Iowa heretofore referred to relate to the control, appropriation, and use of waters for municipal as well as other uses. The State laws relative to the control of the waters of the Cedar River for sewerage disposal purposes are protected by this provision. The executive Council of Iowa is charged with the duty by the State laws hereinbefore described to protect the interests of the public and of the municipalities using that river. The Executive Council has the duty in the first instance to determine whether or not the petitioner's proposed project will interfere with the uses of the water by the public and by the cities and towns located along the Cedar River. Section 9(b) of the Water Power Act just as effectively requires compliance with the laws of the State referred to in Section 27 of the Act as it does with the laws of the State specifically referred to in Section 9(b).

We call attention to the amendment to Section 23 of the Federal Power Act by the Act of August 26, 1935 (16 U.S.C. Sec. 817). That Section merely provides in negative terms that it shall be unlawful for any person, State or municipality for the purpose of developing electric power, to construct, operate or maintain water conduits, reservoirs, power houses, transmission lines, or other project works incidental thereto, across, along or in any of the navigable waters of the United States except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Chapter. It is then provided that no such construction shall be undertaken in any stream or part thereof other than a navigable stream over which Congress has jurisdiction under the commerce clause of the Constitution, until a declaration of intention to so construct has been filed with the Commission. In this connection the Commission is required to investigate and determine whether interstate or foreign commerce would be affected and if the Commission so finds, then a license under the Federal Power Act must be secured, and if the Commission does not so find, then the statute gives permission to construct such dam or other project in such stream *upon compliance with the State laws.*

All of the opinions by the Courts touching upon this question sustain the position of the State of Iowa.

It will be well to note a few of the pronouncements upon the construction to be given to the Federal Power Act in view of the contention of the petitioner herein.

It has always been the established policy of this Court that an overriding Federal power will not be exercised except when Congress manifests a clear intent so to do. This rule was recently expressed in *Connecticut Light & Power Company* v. *Federal Power Commission*, decided March 26, 1945, and reported in 89 L. Ed. 691 at 700. This Court there said:

"We have said, and it is applicable to this case, that 'Where a Federal agency is authorized to invade an overriding Federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of Federal authority to act should appear affirmatively and not rest on inferences alone'. *Yonkers* v. *United States*, 320 U.S. 685, 692, 88 L. Ed. 400, 404, 64 S. Ct. 327; *Florida* v. *United States*, 282 U.S. 194, 211, 212, 75 L. Ed. 291, 301, 302, 51 S. Ct. 119; cf. *Palmer* v. *Massachusetts*, 308 U.S. 79, 84, 84 L. Ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N.S.) 134; *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 351, 85 L. Ed. 881, 883, 61 S. Ct. 580. Nothing except explicit findings excluding the grounds of state control gives assurance that the bounds of Federal jurisdiction have been accurately understood and fully respected, and that state power has been considerately and deliberately overlapped."

Again, in *United States* v. *West Virginia*, 295 U.S. 463 at 472, 79 L. Ed. 1546-1552, this Court interpreted the provisions of Section 9(b) of the Federal Power Act in accordance with the contention of the State of Iowa herein. In that case, the bill sought an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. The Company had secured a license from the State of Virginia under the State laws. There was no contest between the State of Virginia and the Federal Power Commission as to whether the State law controlled or whether the Federal Power Act controlled. The Company asserted that having received its license from the State it was not required to secure one from the Federal Power Commission. In the course of the discussion this Court said:

"The bill seeks an injunction against the corporate defendants, restraining only the construction of the dam without a license from the Federal Power Commission. But *Section 9(b) of the Federal Water Power Act requires that every applicant for a license shall present*

*'satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power * * *'. The mere grant of the state license, which the Federal Water Power Act makes prerequisite to the application for the Federal license, cannot be said to involve any infringement of the federal authority.* It does not appear that the State has done more." (Italics supplied.)

In that case as in the case at bar, there was no threatened interference with the authority of the United States by the State.

In *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 434; 85 L. Ed. 243, 267, the authority and reserved powers of the States is recognized. It is there stated:

"The states possess control of the waters within their borders, 'subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers'. It is this subordinate local control that, even as to navigable rivers, creates between the respective governments a contrariety of interests relating to the regulation and protection of waters through licenses, the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possesses the power to control the erection of structures in navigable waters."

The rule is well stated again in *Illinois Central Railroad* v. *State Public Utility Commission*, 245 U.S. 493 at 510; 62 L. Ed. 425, 438, where it is said:

"In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution * * * it should never be held that Congress intends to supercede or suspend the exercise of the

reserved powers of a State, even where that may be done, unless and except so far as, its purpose to do so is clearly manifested."

Again in the case of *Maurer* v. *Hamilton*, 309 U.S. 589, 614, 84 L. Ed. 969, 980, this Court stated the rule as follows:

> "As a matter of statutory construction congressional intention to displace local laws in the exercise of the commerce power is not, in general to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. This is especially the case when public safety and health are concerned."

Attention is further called to *Kelly* v. *State of Washington*, 302 U.S. 1, 9, 82, L. Ed. 3, 10, where it is specifically stated that the principle is thoroughly established that the exercise by a State of its police power which would be valid if not superceded by Federal action, is superceded only where the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or cannot consistently stand together. In this connection, we specifically call attention to the pronouncements in the opinion by the Court of Appeals in the case at bar and the citations of authority set out on page 51 of the Transcript of Record.

The legislative history of the Federal Power Act clearly discloses that it was not intended that the State laws, such as the laws of Iowa involved herein, were to be superseded by the Federal Power Act.

Petitioner has set out in the Appendix to its brief in this Court, commencing with page 18, what it terms Excerpts from a Thesis by a Mr. Snapp.

This Thesis purports to deal with the legislative history of the enactment of Section 9(b) of the Federal Power Act. We submit that after reading the material quoted in the Thesis, the conclusions of the writer are not borne out by the record. On the contrary, the findings by the United

States Court of Appeals in the opinion in the case at bar, and the contention of the State of Iowa herein are sustained.

We call attention to the statement of Mr. Houghton of New York in the hearing before the House Committee in the following respects:

> "* * * You provide here in Section 9 that each applicant shall submit to the commission certain things. It virtually follows that until he does do that the Federal Power Commission will not issue him a permit. I want to make sure that the permit will not be issued until he has complied with the requirements in the various States as they may exist at the time he makes his application." (Page 22 App. Petitioner's Brief.)

> "There are no public lands in New York State, and the only right the Federal Government has, if any, is under the commerce clause as to navigation." (Page 22 App. Petitioner's Brief.)

> "You say he shall submit satisfactory evidence. That means he has to comply with that condition before he submits his application." (Page 24 App. Petitioner's Brief.)

The foregoing are a part of the dialogue between Congressman Raker and Mr. Houghton. Mr. Raker was sponsoring an amendment which would change Section 9(b) and Mr. Houghton wanted 9(b) safeguarded so that there could be no question but that the State laws were protected.

Further, Representative Mondell appeared before the Committee and among other things stated the following:

> "This act should contain—and I suppose there will be no opposition to that on the part of anyone, as a somewhat similar provision was contained in the Ferris House bill; as exactly the same provision is in the reclamation law, and as the principle has been generally accepted and approved—some such provision as this: 'That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State relating to the control, appropriation,

use, or distribution of water'. That is the language, if I recall it rightly, of the reclamation law, and I think in substance the provision contained in the Ferris bill. That is simply a statement of facts. It is not a new law. It is simply recognition of the situation as a guide to administrative officers who sometimes forget very basic and fundamental things. They get views and theories that lead them far afield." (Page 25 Appendix, Petitioner's Brief.).

Mr. Raker of California offered an amendment which would modify the language of Section 9(b) of the Act. Mr. Mondell in commenting upon Mr. Raker's amendment in part, stated the following:

"Mr. Chairman, I hope the amendment offered by the gentleman from California (Mr. Raker) will not prevail. I think the gentleman must have offered his amendment under a misapprehension of the meaning and effect of the language of the provision. The gentleman is assuming that the language which he attempts to amend requires a completed waterright and a waterright certificate before the party shall be granted a license under this act or his application be considered. That is not true at all. The provision is that the applicant shall have complied with the laws of the State with respect to the appropriation, diversion, or use of water; that is, he shall have complied with all of the laws of the State applicable to the situation up to the time he makes his application. As was suggested a moment ago when the amendment offered by the gentleman from New Jersey (Representative Parker) was under consideration, there are other requirements of State law that will apply after the license has been granted and construction begins, requirements that will continue on through the period of construction and through the period of operation. This provision has no reference to such requirements. It simply requires that the State laws shall be complied with so far as the applicant can comply with them in the nature of things up to the time he makes his application." (Pages 30 and 31, Appendix, Petitioner's Brief.)

Mr. Mondell said more than is set out in the Thesis by Mr. Snapp. He stated also the following:

> "The provision is that the applicant shall comply with the State law. All that the gentleman from California wants him to do is to comply with the State law only so far as the making of the application is concerned. What benefit would it be to the commission that Jones, Smith, or Brown may have picked up a piece of paper and scribbled an application on it and put it in the mail, or perhaps filled out the proper application blank. That gets nowhere and accomplishes nothing. The law of the State is that he shall make his application with certain necessary data and that there shall be in response to that inquiry an investigation as to whether there is water available that can be used to turn a wheel without depriving some one else of a prior right and whether or not the conditions are such that under the State law such water can be used at that point for power purposes. After the license applicant has completed his waterright application he comes before the commission with his own data verified and full information obtained from the State and permission from the State to proceed, and applies for his license from the Federal Government. But the gentleman from California would cut all this procedure off immediately on the application to the State being made or notice posted on the bank of a stream in a hazel-brush patch, where nobody would see it. There would be nothing on which the commission could act, no procedure had which would inform the commission on questions of vital importance." (Congressional Record, Vol. 56, part 10, p. 9814.)

Mr. Sinnott in explaining the conference report of the Senate and House conferees to the House of Representatives specifically pointed out that States Rights were protected, citing Section 9(b) in connection therewith. He stated as follows:

> "Under this bill we respect the rights of the states. In fact, no license can be granted under this bill unless the applicant shows he has complied with the laws of the individual states." (Congressional Record, Vol. 59, part 7, page 6537.)

Mr. John W. Scott, a member of the Federal Power Commission in an article entitled "Is Federal Control of Water Power Development incompatible with State Interests" printed in 9 George Washington; L. Rev. 631 at 646, stated:

> "But notwithstanding the plenary power of the Federal Government over these water resources Congress in its wisdom has carefully refrained in the Federal Power Act from exercising its maximum constitutional authority over these resources or to limit the enjoyment of them by the people of the several states."
>
> "Federal control and 'states rights' in water power resources are compatible. The express provisions of the Federal Power Act impel that conclusion."

Mr. Scott in other parts of the Article cites Section 9(b) of the Federal Power Act as containing one of the limitations of the Federal authority and states that it is one of the protective provisions of state's rights.

In the Excerpts from Mr. Snapp's Thesis set out in the Appendix to Petitioner's Brief are references to statements made by Mr. LaFollette in support of the Act. Those statements sustain the position of the State of Iowa in the case at bar. Among other things Mr. LaFollette said:

> "* * * Under the proposed law the would-be licensee is supposed to have procured all concessions and necessary powers of the State or States in which the proposed project is situated before a license can be issued, thus harmonizing State and Federal interests, making development possible without either transgressing the sovereign powers of the States or conferring on the Federal Government any plenary power not contemplated by the Constitution. Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its right in advance of issue." (Page 27, Appendix to Petitioner's Brief.)

Section 9(b) as presented to the House was exactly as it now reads except that there was not included in the reference to the State laws the phrase "bed and banks". Mr. LaFollette wanted the law amended so as to include in the reference to State laws, the State laws relating to bed and banks as well as to the appropriation, diversion and use of water. In commenting upon his amendment and upon the effect of Section 9(b), Mr. LaFollette stated the following:

> "If we make it one of the conditions precedent to the procuring of a license that the applicant has complied with the requirements of the State law as to bed, banks, diversion, and use of water, we are most assuredly not infringing any State's right in that respect, but are definitely insisting that the State's rules of property as to water, bed, and banks must have been fully complied with or license can not issue." (Page 27, Appendix, Petitioner's Brief.)

Thus it will be observed that throughout the whole history of this legislation, Section 9(b) was carefully guarded and preserved to protect the rights of the States in the waters located within the States and it was intended just as Section 9(b) states, that an applicant for a license under the Federal Power Act must as a prerequisite thereto, first comply with the applicable State laws.

It is submitted that there can be no question in the light of both the legislative and Court history that the United States Court of Appeals for the District of Columbia was correct in its decision in these respects herein, and that that decision should be affirmed.

II.

THE PETITIONER HEREIN IS NOT ENTITLED TO A JUDICIAL REVIEW FOR THE REASON THAT IT HAS FAILED TO EXHAUST THE AVAILABLE ADMINISTRATIVE REMEDIES. THE RIGHT OF THE UNITED STATES TO CONTROL NAVIGATION IS NOT INVADED OR EVEN THREATENED IN THIS CASE.

As heretofore stated, the petitioner ignored the Iowa statutes requiring that it apply for a permit to construct the project under and in accordance with the laws of the State of Iowa. Petitioner takes the position that Section 9(b) does not mean what it says because the Federal Power Commission is given the power under the Federal Power Act to issue licenses and to prescribe conditions for the construction of projects such as it proposes. Petitioner argues that perforce it should not be required to secure licenses from both the State and the Federal Power Commission. As heretofore stated, there has been no conflict and there is no conflict between the State of Iowa and the Federal Power Commission. The State of Iowa is merely asserting that the petitioner must under the Federal Power Act and particularly Section 9(b) thereof first comply with the applicable State laws before applicant can secure a license from the Federal Power Commission if that Commission can be persuaded to grant one. The alleged controversy stated by petitioner therefore has no foundation. As stated by the United States Court of Appeals in its opinion herein "one who is required to take out a license will not be heard to complain in advance of application, that there is danger of refusal * * * he should apply and see what happens." (Tr. p. 55.) Citing *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U.S. 608, 616-617. As heretofore stated, it is possible that the Executive Council and the petitioner might be able to work out a project for which the Executive Council of Iowa would issue a permit, but under the circumstances and the status of this case this

Court is not in a position to pass upon the question raised by petitioner. As stated in *United States* v. *West Virginia*, 295 U.S. 463, 473, 79 L. Ed. 1546, 1552, "The mere granting of a State license which the Federal Water Power Act makes prerequisite to the application for a Federal license, cannot be said to involve any infringement of the Federal authority. It does not appear that the State has done more."

Further, in *United States* v. *West Virginia*, *supra*, the following is stated:

> "General allegations that the State challenges the claim of the United States that the rivers are navigable, and asserts a right superior to that of the United States to license their use for power production, raise an issue too vague and ill-defined to admit of judicial determination. They afford no basis for an injunction perpetually restraining the State from asserting any interest superior or adverse to that of the United States in any dam on the rivers, or in hydro-electric plants in connection with them, or in the production and sale of hydro-electric power. The bill fails to disclose any existing controversy within the range of judicial power."

Further, in *United States* v. *West Virginia*, *supra*, this Court stated:

> "The sovereign rights of the United States to control navigation are not invaded or even threatened by mere assertions. It is, in this respect, in a position different from that of a property owner, who because of the adverse claims to ownership can neither sell his property nor be assured of continued possession. The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it."

This subject was treated also by this Court in *United States* v. *Appalachian Electric Company*, 311 U.S. 377, 423, 85 L. Ed. 243, 261, where the following appears:

> "The briefs and arguments at the bar have marshaled reasons and precedents to cover the wide range

of possible disagreement between Nation and State in the functioning of the Federal Power Act. To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us."

It is therefore submitted that petitioner is not entitled to challenge the validity of the statutes of the State of Iowa under the status of this record. The rule is well established that this Court will not undertake to construe the statutes of Iowa in the absence of a construction thereof by the Courts of Iowa. It was conceded upon the presentation before the United States Court of Appeals that there has been no construction of the provisions of Chapter 363 of the Code of Iowa of 1939 by the Iowa Courts. (Tr. p. 47.) *Alabama State Federation of Labor* v. *McAdory*, U.S. , 89 L. ed. 1270, 1282, S. Ct., ; *Asbury Hospital* v. *Cass County, N. D.*, U.S. , 90 L. ed. 1, 5, S. Ct.

If for no other reason than those advanced in this division of our argument, the judgment and decision of the United States Court of Appeals herein should be affirmed.

III.

REPLY TO PROPOSITIONS ARGUED BY PETITIONER.

A. In Division I of petitioner's argument it is stated that a State permit is not required for the construction of a proposed project under the provisions of Chapter 363 of the Code of Iowa because of the provisions of Section 23(b) of the Federal Power Act. Petitioner misconstrues and misunderstands the purport and meaning of Section 23 of the Federal Power Act. It will be observed that Section 23(b)

amends the original Federal Power Act and was enacted in 1935 after some experience and difficulty with companies who had constructed dams and projects in rivers over which Congress has jurisdiction under the commerce clause of the constitution prior to the enactment of the Federal Power Act and prior to June 10, 1920. It will be observed that many projects were authorized by separate and individual Acts of Congress and by various States. Section 23(b) was enacted to cover those situations and not for the purpose of changing the basic or fundamental law, nor of changing the relative rights of the States and of the Federal Government as stated in the original Act, but to extend the provisions of the Act to cover all previously built dams and projects. As stated, in *United States* v. *Appalachian Electric Power Co.*, C.C.A. Va., 1939, 107 F. (2d) 769, this Section gives the Federal Power Commission authority only over a stream over which Congress has jurisdiction under the commerce clause, with the purposes of taking care of proposed structure in non-navigable tributary of an interstate navigable stream, and of providing convenient administrative procedure to determine doubt whether navigable capacity of down-stream waters might be affected by a project, from the Government's standpoint, so that the project owner would know the Government's position in the matter.

Therefore, it is submitted that the provisions of Section 23(b) are supplementary to the other provisions of the Act and are definitive only of border line situations. There is nothing in Section 23(b) which affects or changes the requirements of Section 9(b) of the Act.

B. Petitioner states that Chapter 363 of the Iowa Code has no valid application where a license is required by the Federal Power Act. What we have heretofore said in the other divisions of our argument we believe fully covers this proposition. The attempt of petitioner to show a conflict

in the provisions of Section 23(b) of the Federal Power Act with the provisions of Chapter 363 of the Iowa Code is untenable.

Petitioner cites in support of its contention, *Wisconsin Public Service Corporation* v. *Federal Power Commission*, 147 F. (2d) 743, wherein the Company had secured a permit for the reconstruction of a dam from the State of Wisconsin. The Company took the position that inasmuch as the State of Wisconsin had granted its permit that the Federal Power Commission was without power to require the Company to take out a license under the Federal Power Act. The Court in its opinion cites Section 23(b) of the Federal Power Act, and refers to the contention of the Company that the Act does not apply to dams constructed prior to the passage of the Federal Power Act. The Court found that Section 23(b) extended the power of the Act over dams built prior to the enactment of the Federal Power Act and therefore held that the dam was subject to the provisions of the Act. The fact that the dam had been built under a State license issued prior to the taking effect of the Federal Power Act did not relieve the Company from the requirements of the Act. There is nothing in that decision which holds or states that a license issued by the State was ineffective and that the Company need not comply with State laws.

C. Petitioner in Division II of its brief reiterates its previous statement that Section 9(b) of the Federal Power Act does not require a permit from the Executive Council of Iowa as provided by Chapter 363 of the Iowa Code, because petitioner claims Congress has taken complete control over power projects coming within its jurisdiction. Counsel argues that to require a permit from the State and a license from the Commission creates a dual authority which cannot be reconciled. Again we state that petitioner is forgetting the question. There is no contest and no issue existent be-

tween the State of Iowa and the Federal Power Commission under the Federal Power Act. There may never be any difference of opinion. In practically every case which has reached the Courts, there has been a State license and a Federal license has been required in addition to the State license. We are not aware of any case where a conflict has appeared between the requirements of the State and the requirements of the Federal Power Commission. Therefore, the question is moot in so far as the case at bar is concerned.

Counsel refers to the statement of Congressman Raker who was attempting to secure an amendment which radically changed the provisions of Section 9(b). What he had to say was in the light of a particular California law and Congress rejected Congressman Raker's interpretation and his amendment.

Petitioner states that the Federal Power Commission is ready to issue a license. There is no language in the opinion which justifies that assertion. The Federal Power Commission is in no position to determine whether it is ready to issue a license until the requirements of the Federal Power Act have first been complied with and particularly until Section 9(b) of the Act has been complied with. The questions raised by petitioner are legislative in character and not judicial. If petitioner does not like the requirements of Section 9(b) it should attempt to have them removed in the legislative halls rather than by judicial construction.

Petitioner cites *United States* v. *Appalachian Electric Power Company, supra*, as sustaining its position. As heretofore indicated the opinion in that case sustains the position of the State of Iowa and the opinion and decision of the United States Court of Appeals herein is in accord with the applicable parts of the opinion in *United States* v. *Appalachian Electric Power Company, supra*. We have no quarrel as an abstract proposition with the quotations from that decision.

Petitioner cites *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, in which the Court recognizes the power and authority of Congress to exercise plenary and exclusive control over obstructions and improvements in navigable waters of the United States. We have no quarrel with the quotation from that decision. Petitioner overlooks the fact that in every one of these cases and in every case where a question of the power of the Federal Government is raised, the question is a negative one and one where the Court is asserting the power of the Government to *prevent* obstructions in navigable waters of the United States. In no case is there an assertion of an affirmative power to require or to force the building of an obstruction in a navigable water contrary to and in violation of the laws of the State in which it is located. As stated by the United States Court of Appeals in its opinion "The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act." (Tr. p. 70.)

D. In Division III of its brief, petitioner states that Section 9(b) of the Federal Power Act does not afford the basis for joint participation in the issuance of licenses for power projects upon the navigable waters of the United States by States and the Federal Government. The Court in its opinion in this case based its statement set out at the bottom of page 46 of the Transcript upon what this Court said in *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377, at 428 and 429. Therefore, there can be no question about the soundness of the statement in the opinion. Further, counsel again in this Division contends that Section 23(b) of the Act is the key section of the law. We again submit that petitioner is in error in this assertion. Counsel also contend that the provisions of Section 9(b) can apply only to situations which exist in Western states where

water for irrigation of arid lands is of vital public importance. There are no limitations of any such character in the language of Section 9(b).

Counsel cites a case which arose in 1912 in California entitled *Imperial Water Co. No. 5* v. *Holabird*, 197 Fed. 4. We can see no application whatsoever to what is said in that case to the situation in the case at bar.

Also, petitioner cites *Eastern Oregon Land Co.* v. *Willow River Land & Irrigation Co.*, 204 Fed. 516, an Oregon case which arose in 1913. Neither do we see any application in that case to the situation involved in the case at bar.

Counsel also refers to the statements by Representative LaFollette in connection with the bill. Mr. LaFollette was referring primarily to his amendment to include in the comprehensive language of Section 9(b) the State laws relative to beds and banks of rivers. There is nothing in what he said which detracts at all from the rest of the provisions of Section 9(b).

The petitioner also refers to the statements of Congressman Mondell. We submit that Congressman Mondell's statements when read as a whole agree with the interpretation made by the lower Court in its opinion herein, and the contention of the State of Iowa in this case. We refer the Court to our affirmative argument upon this legislative history.

Again, petitioner refers to the case of *Henry Ford and Son, Inc.* v. *Little Falls Fibre Co., et al.*, 280 U.S. 369. That case has no application to the case at bar. It involved damages to property rights of users of the water above the dam in question, and the Court in that opinion was discussing the right of the upper riparian user of the water for damages because of the destruction of that use. There is nothing in the opinion in that case which gives sustenance to petitioner.

Petitioner next tries to avoid the effect of *United States* v. *West Virginia, supra.* There can be no question about the

application of the language of the Court in that case to the situation in the case at bar. In the *West Virginia* case the Company was trying to avoid compliance with the Federal Power Act. The Company had already complied with the laws of the State of Virginia. This Court held that it not only had to comply with the laws of Virginia as a prerequisite to its application for a Federal license, but that the Federal Power Act also applied to it. There is no sustenance in this case for petitioner either.

On page 43 of its brief, petitioner states that the State of Iowa contends that it has the right to prohibit and prevent the construction within the State of a "Federal project" under a Federal license. Counsel for petitioner is again arguing as though a permit-holder under the Federal Power Act authorized to construct a private project assumes the prerogatives of the Federal Government under the commerce clause. That is not true. Petitioner's proposed project is not a Federal project. There is no such an issue in this case. The Ninth Circuit Court in *United States* v. *Central Stockholders Corporation of Vallejo*, 52 F. (2d) 322, stated:

> "The Supreme Court held in the *Ford* case, (*Ford & Son* v. *Little Falls Co.*, 280 U.S. 369, 50 S. Ct. 140, 74 L. Ed. 483) in effect, that it was not the intention of Congress to vest any portion of its sovereign power in the permittee, and, assuming that the government might have exercised its control over navigable streams by and through a permittee under the Federal Water Power Act, that it was not the intention of the Government so to do."

The present case does not involve any such an issue or question. Therefore all of the argument of petitioner in Division III of its argument is beside the point and is strained innuendo which cannot stand up in the light of the plain and unequivocal language of Section 9(b) of the Federal Power Act.

E. In Division IV petitioner complains that under no circumstances would it be required to comply with Section 7796 of the Code of Iowa which provides that before an applicant can be given a permit by the Executive Council of Iowa, the applicant shall first secure a permit from the Board, Commission, or other Federal body charged with jurisdiction over and control of the highways or state-owned lands. As heretofore stated, the proposed project would inundate several paved primary highways of the State and thus interfere with highways under the jurisdiction of the State Highway Commission, and would interfere with the existing recreational and fishing facilities in the Cedar River which are under the jurisdiction of the State Board of Conservation. Obviously in order to secure a permit from the Executive Council of the State of Iowa under the provisions of Chapter 363 of the Code of Iowa, petitioner would have to clear with the State Highway Commission and the State Board of Conservation.

F. Counsel contends that the lower Court erred in concluding that the Commission properly insisted upon a good faith effort by this applicant to comply with the State law. That statement taken with the other pronouncements in the opinion clearly indicate that the Court is holding that Section 9(b) requires compliance with the applicable laws of the State of Iowa as a prerequisite to the issuance of a license by the Federal Power Commission. Counsel is indulging in a play upon words. We do not deem this Division worthy of any further reply.

It is submitted that the petitioner has failed to sustain its contentions and has failed to show that the United States Court of Appeals for the District of Columbia erred in its opinion and decision herein.

CONCLUSION.

In concluding the brief of the State of Iowa, Intervenor, it is submitted that the opinion and decision of the United States Court of Appeals for the District of Columbia herein should be affirmed. Petitioner has failed to show any legitimate or sound reason for a reversal.

It will be noted that the project proposed here completely cuts off the lower twenty-nine miles of the Cedar River and completely destroys any possible navigation upon that River. The sole purpose of the project is to construct a power plant to produce electric current to be sold commercially.

As stated by this Court in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426, 85 L. Ed. 213, 262;

> "As respondent soundly argues, the United States cannot by calling a project of its own, 'a multiple purpose dam,' give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water Power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce."

The petitioner is here seeking "to use a navigable waterway for power generation alone." The commerce power is linked specifically with navigation and navigability. Obviously a project which completely destroys any semblance of navigation is not an aid to navigation or to commerce.

Counsel for petitioner has persistently asserted that the Cedar River is a navigable river because the Commission made such a finding in an ex parte proceeding without judicial notice. That question may or may not be important under the questions properly before this Court. However, we desire to call the attention of the Court to the fact that the Cedar River is located in the State of Iowa and joins the Iowa River

in the State of Iowa. The Iowa River from the point of the junction of the Cedar River with it, flows into and joins the Mississippi River. Congress found that the portion of the Iowa River below the junction with the Cedar River is non-navigable. Therefore, that part above the Iowa River would be non-navigable because interstate commerce could not get out of the Cedar River into the Mississippi River through a non-navigable stretch. Attention is specifically called to the following Acts of Congress:

> "Acts of Congress of May 6, 1870. (Iowa River.) So much of the Iowa River within the State of Iowa, as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Rev. Stat. 1878, Sec. 5278, U.S.C.A. Title 33, Sec. 31.)

> "Acts of Congress of Aug. 18, 1894. So much of the Iowa River within the State of Iowa as lies between the town of Toolsboro and the town of Wapello in the County of Louisa, shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it." (Chap. 299, 53rd Congress, 2nd Session, U.S.C.A. Title 33, Sec. 31.)

Further, the matter of the navigability of the Cedar River was before the Federal Power Commission in 1922 in a proceeding entitled "Declaration of Intention of Iowa Railway and Light Company to Construct a Dam on the Cedar River". The minutes of the Commission on March 27, 1922, state:

> "In the matter of the Declaration of Intention by the Iowa Railway and Light Company of Cedar Rapids, Iowa, to construct a dam across and in Cedar River at a point about three miles above Rochester, Cedar County, Iowa, the Commission having caused the matter to be investigated, and it appearing from the report of such navigation that Cedar River is not a navigable water of the United States and that the proposed construction will not affect interstate or foreign commerce, it was voted that the Commission finds that the interests of

interstate or foreign commerce would not be affected by such proposed construction.

Given under my hand and the seal of the Federal Power Commission.

(signed) O. C. Merrill,
(Seal) Executive Secretary.
Federal Power Commission U.S.A."

Thus it will be observed that Congress has declared by law that the waters below the proposed project are non-navigable, and the Federal Power Commission has declared that the waters above the proposed project are non-navigable. These matters were in the record before the Power Commission. Therefore, there is serious question about the whole thing. However, the question is not important at this time for the reason that the basic questions are whether the petitioner has complied with the requirements of Section 9(b) of the Federal Power Act and whether or not petitioner can maintain this action in view of the status of the record.

It is therefore submitted that the judgment and opinion of the United States Court of Appeals of the District of Columbia herein should be affirmed for all of the reasons hereinbefore stated.

Respectfully submitted,

JOHN M. RANKIN, Attorney General of Iowa,
State House,
Des Moines, Iowa,
NEILL GARRETT, Special Assistant Attorney General of Iowa,
1204 Equitable Building,
Des Moines, Iowa,
Attorneys for State of Iowa, Intervenor.

Of Counsel:
HORACE L. LOHNES and
C. WALTER HARRIS,
1111 Munsey Building,
Washington, D. C.